Supreme Court, U.S.
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No. 98-276 (2)

In The

Supreme Court of the United States

October Term, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Petitioners,

v.

JANET KATHLEEN WAGNER; LAS VEGAS METROPOLITAN POLICE DEPARTMENT; STATE OF NEVADA, EX REL.; NEVADA HIGHWAY PATROL; LIEUTENANT EDWARD JENSEN; SERGEANT RICHARD WOMACK; SERGEANT CURTIS ALBERT; SERGEANT THOMAS HARMON; DETECTIVE RICHARD HART; DETECTIVE WILLIAM JOHNSON; OFFICER WILLIAM SMITH; OFFICER KEITH BOWERS; OFFICER DAVID WAGNER; OFFICER GREG GOEN; SERGEANT WILLIAM ADAMSON; SERGEANT HARVEY WEATHERFORD; TROOPER JOSEPH A. SMITH; TROOPER GARTH GARDNER; TROOPER JOSEPH WYNGARD; AND TROOPER JAMES BRANNUM,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT LVMPD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. WHETHER THE NINTH CIRCUIT CORRECTLY DECIDED, IN A CASE WHERE THE CONSTITUTIONAL VIOLATION ALLEGEDLY DEALS WITH DELIBERATE POLICE "COVER-UP", THE CAUSE OF ACTION ARISING FROM SUCH EVENTS DOES NOT BECOME RIPE UNTIL IT CAN BE SHOWN THE ACTIONS RESULTED IN MEANINGFUL DENIAL OF ACCESS TO THE COURTS – SUCH AS RENDERING STATE COURT REMEDIES INEFFECTIVE.

PARTIES TO THE PROCEEDING

Respondents do not disagree with the characterization of the parties to this proceeding identified in the Petition for Writ of Certiorari.[1] For the purposes of this Opposing Brief, Michael C. Delew, Vickie Mayberry and H. Roy Mayberry will be monickered "DELEWS".

Respondents Las Vegas Metropolitan Police Department; Lieutenant Edward Jensen; Sergeant Richard Womack; Sergeant Curtis Albert; Sergeant Thomas Harmon; Detective Richard Hart; Detective William Johnson; Officer William Smith; Officer Keith Bowers; Officer David Wagner; and Officer Greg Goen, will hereinafter be collectively referred to as "LVMPD".

Respondent Janet Kathleen Wagner will hereinafter be referred to as "WAGNER". Respondents State of Nevada, ex rel.; Nevada Highway Patrol; Sergeant William Adamson; Sergeant Harvey Weatherford; Trooper Joseph A. Smith; Trooper Garth Gardner; Trooper Joseph Wyngard; and Trooper James Brannum will hereinafter be collectively referred to as "NHP".

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[1] Respondent would bring to this Court's attention that DELEWS are also Cross-Respondents in this action by way of the Conditional Cross-Petition for Writ of Certiorari filed by the LVMPD on September 14, 1998.

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JURISDICTION

On April 4, 1997, the Honorable Phillip M. Pro of the United States District Court for the District of Nevada entered and served an Order which dismissed Petitioners' litigation in its entirety.[2]

Thereafter, this matter was timely brought before the Ninth Circuit Court of Appeals and was subjected to its briefing schedule. After considering the briefs and hearing oral argument on the matter, the Ninth Circuit issued its opinion – reversing the decision of Judge Pro. *See Petitioners' Appendix beginning at p. 1a.* The Opinion did not, however, reach the merits of the case. Instead, it dismissed the litigation without prejudice – believing the federal claims were unripe until the pending State court litigation had concluded.

That Order was issued on May 11, 1998. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). LVMPD concedes jurisdiction is found pursuant to Supreme Court Rule 13(1) and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

LVMPD concedes Petitioners' Complaint alleged violations of the constitutional provisions identified in the Petition for Writ of Certiorari.

[2] A complete copy of this Order is found in Petitioners' Appendix beginning at page 10a.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 10, 1994, Michael Delew filed State Court litigation against WAGNER in the Eighth Judicial District Court in Clark County, Nevada. That litigation averred WAGNER had negligently operated her vehicle while under the influence of alcohol in such a manner as to cause the death of Erin Rae Delew. The Complaint was amended to include Petitioners H. Roy Mayberry and Vickie Mayberry as parties-Plaintiff. The causes of action and claims for relief remained the same.

After prodigious discovery had been conducted, in the State Court litigation, on September 18, 1996 on the eve of trial, Petitioners attempted to amend the Complaint – broadening its claim for relief from the wrongful death action to include civil rights claims against LVMPD and NHP. In addition, WAGNER was alleged to have been involved in these civil rights violations. WAGNER opposed expanding the litigation at that late date.

On September 24, 1996, WAGNER and DELEWS appeared before the State Court judge to whom the case was assigned. The Judge determined, since DELEWS had not filed the litigation against all of the proposed defendants at the outset (or even as discovery progressed), to bring in new claims when the litigation was on the eve of trial would be unduly prejudicial. Immediately thereafter, DELEWS filed a second Complaint in the State Court containing the exact same Defendants and allegations but divesting itself of the state wrongful death claims. Upon being served with the Complaint, LVMPD removed the matter to the United States District Court for the District

of Nevada on January 23, 1997. WAGNER's initial appearance in the federal litigation was in the form of a Motion to Dismiss filed on February 10, 1997.[3] Her Motion argued no 42 U.S.C. § 1983 cause of action could exist due to the fact a constitutional right to police investigations did not exist under extant law. She further argued there was no evidence for a conspiracy and that Petitioners were attempting to wrongfully split their cause of action.

The Honorable Judge Phillip M. Pro issued an Order on April 4, 1997 addressing the Motion to Dismiss and dismissing the litigation in its entirety.[4] Noting the action was commenced on September 26, 1996, Judge Pro accurately described the action as one based on a fatal accident occurring September 27, 1994 wherein Ms. Delew was struck while riding her bicycle by a vehicle driven by WAGNER. He held DELEWS were not allowed to split the causes of action by bringing a state wrongful death action and a separate 42 U.S.C. § 1983 action on the facts alleged in the case. The accident, alone, failed to provide a basis for lawsuit under 42 U.S.C. § 1983 against WAGNER as a private citizen. To the extent the litigation attempted to bring in NHP and LVMPD as conspirators with WAGNER to violate the constitutional rights of the decedent, he asserted the claim was defective because there was no allegation of evidence indicating the actions of the alleged conspirators infringed upon any cognizable, protected right of Petitioners. Accordingly, the litigation was dismissed in its entirety.

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[3] Two separate Answers were filed on behalf of LVMPD and NHP.

[4] This Order is attached to the Petitioners' Appendix beginning at p. 10a.

On April 21, 1997, this matter was appealed to the Ninth Circuit Court of Appeals. After briefing and oral argument, the Ninth Circuit issued its Order on May 11, 1998.[5] In that Order, the Ninth Circuit believed a potential constitutional violation for interference with Petitioners' meaningful access to the courts could arise from a simple automobile accident.

Under the procedural posture of this case, however, the Ninth Circuit properly held that, assuming a claim for unconstitutional cover-up investigation can be made, such a cause of action is not ripe until a party has been denied "meaningful access" to the state court. Since that issue has yet to fully unfold, it is simply premature to bring litigation which challenges that the alleged cover-up investigation impaired their access to the Court. Obviously, if Petitioners are successful at the State Court level, then – despite any efforts to allegedly cover-up any wrongful conduct – no constitutional rights would have been violated. There is, therefore, no reason for this Court to act to destroy the Ninth Circuit's decision in this specific regard.[6]

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[5] The complete text of this opinion is found at Petitioners' Appendix beginning at p. 1a.

[6] As the Court will notice, however, LVMPD disagree with the validity of the Order itself so far as it implicates a constitutional cover-up violation could have taken place. That issue is more fully developed in the Conditional Cross-Petition for Writ of Certiorari which LVMPD filed with this Court on September 14, 1998.

B. STATEMENT OF FACTS

Setting aside, for the moment, the unsupported histrionics contained in DELEWS' factual statement, it is respectfully submitted there are only a few sources to which this Honorable Court may go in determining the basal facts of the litigation. They are DELEWS' Complaint which was ultimately dismissed by Judge Pro, and the arguments and exhibits found in WAGNER's Motion to Dismiss (and its resultant progeny). Reviewing those documents reveals a "factual" scenario for this Court to use as the canvas upon which its legal decisions may be properly based.

On December 27, 1994, at approximately 7:15 p.m., Erin Rae Delew was riding her bicycle in the vicinity of West Lake Mead Boulevard and Ridgemore Street in Las Vegas, Nevada. *LVMPD Respondents' Supplemental Appendix ("SA") 5 at ¶ 13.* The Complaint asserts WAGNER was also operating a vehicle in the area and was, at that time, operating the vehicle at an excessive speed while under the influence of alcohol. *Id.* at ¶¶ 16-17. WAGNER is alleged to have caused her vehicle to collide with the bicycle – causing Erin Rae Delew to be projected approximately 60 feet from the point of impact and ultimately causing her death. *Id.* at ¶ 15.[7]

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[7] The independent statement by Susie Olsen indicated she saw a woman on a dark bike without strobe or lights swerving quite a bit because she was attempting to negotiate turning across the street and had a bag of groceries she was carrying. *SA 37-39. Ms. Delew apparently also had a headset on. Id.* Ms. Olsen believed WAGNER was unable to see the bicyclist because it was too dark, the road was curving, and trees blocked

At the time of the accident, Lt. Colonel Robert A. McNeese was in the area and ran to the scene. *SA 23-25.* Upon arriving at the scene, he immediately went to the victim and was unable to find a pulse, identify breathing, or hear a heart beat. *SA 33-34.* At the same time – before the police and ambulance arrived – a doctor arrived at the scene and confirmed Ms. Delew was dead. *SA 35.* A patrolman who arrived also felt for a pulse and thought she was dead. *SA 35-36.* Before any other police appeared, an ambulance arrived and the paramedics therein verified Ms. Delew was dead. *SA 36-37.*

After this, additional LVMPD police officers arrived; NHP was contacted and arrived to conduct the investigation. Petitioners claim the subsequent investigation of the accident, including the procurement of an independent witness statement by one Susie S. Olsen *(SA 37-39)* was designed to "cover up" wrongful activities of WAGNER; and, by so doing, deprived Petitioners of access to the Courts; the right to petition the government for redress of grievances under the First Amendment; the right to prosecute wrongful deaths without impairment or interference; and the right to have a fair and impartial investigation of a death. *See SA 11-13 at ¶ 29(a)-(h).*

Sometime after the accident, WAGNER called her husband. *SA 41-42.* When her husband arrived many minutes later, she was unclear whether other officers or even paramedics had arrived. *SA 42, 44.*

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her vision. *Id.* Apparently, the bicycle swerved in front of WAGNER's vehicle immediately before the impact.

WAGNER testified no officer attempted to separate her from the scene of the collision or to segregate her from other people at the scene. *SA 44-45.* Approximately an hour or so after the accident, she was asked to give a statement. *SA 45.* She was given a field sobriety test (HGN). *SA 69-70.* The result of that test, however, was (in the words of NHP Officer Smith) negative "as far as the six clues or points that you look for. . . . " *Id.* During this time, WAGNER needed to use the restroom and was driven home so she could do that. *SA 49-50.* As a result of the exculpatory statement of Ms. Olsen, the negative results of the field sobriety test, and NHP's investigation, WAGNER was not cited for the death of Ms. Delew.

The remainder of the "factual allegations" and assertions in the Petition for Writ of Certiorari may be plainly seen by this Court – upon review of the record – to be little more than gross speculation and conjecture. Certainly there was nothing in the Complaint nor in the evidentiary record before Judge Pro which supported the lurid and psycho-historical "factual" reconstruction DELEWS portray. This is simply an accident involving WAGNER and Ms. Delew. There is nothing supporting the fraudulent assertions that, somehow, NHP or LVMPD was involved in any cover-up.

Moreover, there was simply no evidence adduced that state court could not vindicate Petitioners' alleged interest in punishing WAGNER (assuming their view of the facts is true). In the pending state court litigation DELEWS are allowed to cross-examine the investigating officers, bring up any inconsistencies they believe existed in the investigation, and set forth all of the evidence in

their possession that WAGNER had, in fact, been drinking that evening and was the primary cause of the fatal accident. They have not been denied the opportunity of filing a suit, conducting discovery, or being able to present evidence in this regard. As it presently stands, Petitioners can prevail in their state court litigation (assuming their contentions about WAGNER's culpability are correct). By the same token, a jury – having considered all of the relevant evidence – may well conclude WAGNER did nothing wrong.

The Circuit's primary concern was that before the litigation could be ripe, Petitioners had to show they were somehow denied meaningful access to the courts or a fair opportunity to have their grievances redressed in state court – based solely upon the actions of LVMPD and NHP in conducting their subsequent investigation into the accident itself. In this regard, their decision was consistent with the posture assumed by this Court on other issues and the majority of other Circuits deciding this very matter.

LEGAL ARGUMENT

Initially, LVMPD strongly disagrees with the Ninth Circuit's decision that, under the peculiar facts of this case, DELEWS stated a "cognizable" claim under § 1983. In fact, as Petitioners' own cited cases specifically indicate, cover-up conspiracies only apply in the investigation of a wrong perpetrated by a co-employee under color of state law or under a wrongful investigation of an injury perpetrated by a co-employee acting under color of

state law. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1261-62 (7th Cir. 1984); *see Webster v. City of Houston*, 689 F.2d 1220, 1239 (5th Cir. 1982).[8] Assuming arguendo this Court believes a potential § 1983 violation could exist under the peculiar facts of this case, it is clear the decision of the Ninth Circuit was absolutely correct.

I. NO LITIGATION CAN BE BROUGHT BEFORE IT IS RIPE

This Court has held, for well over ninety (90) years, that the right of access to the courts is a fundamental right protected by the Constitution of the United States. *See Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). While it is true 42 U.S.C. § 1983 provides no condition precedent to pursuing cognizable claims and is broadly construed to provide a remedy against all forms of official violation of federally protected rights, it is not accurate to state that any claim which could potentially fall under the auspices of 42 U.S.C. § 1983 can be brought at any time a plaintiff desires.

DELEWS argue the absence of "timing" language in 42 U.S.C. § 1983 somehow renders the decision ineffectual. This analysis – albeit simplistic – grossly fails to understand the core requirements necessary for any cause of action (under 42 U.S.C. § 1983 or otherwise). Indeed, were Petitioners' argument to be carried to its logical conclusion, statutes of limitations would have no effect

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[8] This contention, however, has been addressed with the Conditional Cross-Petition which is on file with this Honorable Court and will not be examined in depth here.

on 42 U.S.C. § 1983 causes of action because the statute itself contains no such language regarding same. Yet, it is an undeniable fact that statutes of limitation have long been respected as fundamental to a well-ordered judicial system. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Hawkins v. Joshua Barney's Lessee*, 5 Pet. (30 U.S.) 457, 466 (1831). In fact, this court specifically noted – in the case of 42 U.S.C. § 1983 – even though because Congress did not state a limitations period existed, its existence was always implied. *Felder v. Casey*, 487 U.S. 131 (1988).

Just as a statute of limitations is a crucial element of a well-ordered judicial system, so likewise the concept of "ripeness" underlies the ability to bring forth any claim. This concept is designed to ensure, at the time the judiciary has the case under consideration, the required elements necessary to establish both the existence of the constitutional violation and the presence of damages are extant. This Court has specifically noted the ripeness doctrine is drawn from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n. 18 (1993).

Ripeness requires the court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties in withholding court consideration. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed

may not occur at all." *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 581 (1985).[9]

For a ripe "case or controversy" to exist, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The requisite injury needs to be "distinct and palpable." *Warth v. Selden*, 422 U.S. 490, 501 (1975). It is insufficient to allege an abstract injury. *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974).[10]

"Ripeness is peculiarly a question of timing." *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). The inquiry as to ripeness of a case for federal court action contains both constitutional and prudential components. *Portman v. County of Santa*

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[9] For example, in the context of a takings claim, such a claim is not ripe for review until the litigant has used the administrative procedures available and been denied just compensation. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985); *McKenzie v. City of Whitehall*, 112 F.3d 313, 317 (8th Cir. 1997). "While there is no requirement that administrative remedies be exhausted in cases brought under 42 U.S.C. § 1983 . . . the claim must be ripe, and not moot, to be reviewed properly." *McCabe v. Arave*, 827 F.2d 634, 639 (9th Cir. 1987).

[10] In many ways, the ripeness doctrine is related to the "standing" doctrine. It requires the plaintiff to demonstrate that (1) it will sustain injury from the challenged action, (2) the injury would be redressed by the relief requested, and (3) the court's ability to resolve the issues presented would not be advanced by waiting until the uncompleted event occurs. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978).

Clara, 995 F.2d 989 (9th Cir. 1993). The constitutional component focuses on whether there is sufficient injury while the prudential component focuses on whether there is adequate record on which to base effective review. *Id.* Its rationale is to prevent courts, through avoidance of premature adjudication, from entangling them in abstract disagreements.[11]

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[11] This Honorable Court has recently held a § 1983 action "must always and everywhere be available." *Spencer v. Kemna*, ___ U.S. ___, 118 S. Ct. 978 (1998). However, this does not constitute a derogation of "ripeness" principle. In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court applied elements of tort law in determining when a cause of action was *ripe*. Citing prior decisions, it noted 42 U.S.C. § 1983 creates a species of tort liability. 512 U.S. at 483.

> [O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for the recovery, provide the appropriate starting point for the inquiry under § 1983 as well.

Id. (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)). Accordingly, it first looked to the common law of torts to determine whether there would be a bar to the litigation brought before it. *Id.* Determining that every element necessary to establish a civil tort action was not present in that case (dealing with wrongful conviction claims), this Court held a claim for damages bearing a relationship to a conviction or sentence that has not been invalidated is not cognizable and would not be recognized under 42 U.S.C. § 1983. 512 U.S. at 487.

Thus, merely because 42 U.S.C. § 1983 does not discuss concepts of ripeness, DELEWS err in arguing to this Court that such concepts do not apply in this litigation. Clearly they do. The only question, therefore, is whether the Ninth Circuit correctly applied this concept in determining when an alleged constitutional violation predicated upon allegations of wrongful cover-up activities becomes "ripe". It is respectfully submitted, to the extent the facts before this Court can establish such a violation, the Ninth Circuit gauged that timing correctly.

II. A "COVER-UP" CONSTITUTIONAL VIOLATION CANNOT TAKE PLACE UNTIL THE UNDERLYING STATE LAW CLAIM (IF ONE IS FILED) IS RESOLVED

It cannot be gainsaid Petitioners have already filed a proceeding in state court to persecute WAGNER for the allegedly wrongful death of Ms. DELEW. They have conducted an immense amount of discovery, have had access to police reports (including the identification of all witnesses known at the scene) and have had the opportunity to take depositions of all persons they deemed relevant to the case. They have accessed the medical records regarding WAGNER and have her own statements regarding her behavior that evening. They have records of the physical evidence collected at the time of the investigation. Thus, they have not been denied the ability to factually investigate the events surrounding the death of Ms. DELEW or to file a claim based on their belief as to what "really" happened.

Within this context, the Ninth Circuit has consistently held *if* a plaintiff, on a cover-up allegation claim, succeeds in state court then the cover-up allegations are mooted. *Dooley v. Reiss*, 736 F.2d 1392, 1394-95 (9th Cir.), *cert. denied*, 469 U.S. 1038 (1984).[12] *Cf. Landrigan v. City of Warwick*, 628 F.2d 736, 742 (1st Cir. 1980) (dismissing § 1983 claim alleging cover-up where plaintiff had in fact prevailed in previous state court action). In *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 625 (9th Cir. 1980), the Circuit specifically held – because the ultimate resolution of a state court litigation had not been finalized – a claim for cover-up conspiracy was not ripe for judicial consideration. Accordingly, while dismissal was appropriate, that dismissal should be without prejudice.

Despite Petitioners' protestations to the contrary, there is a strong line of reasoning supporting the concept that the ability to file the litigation seriously limits the claim of any "cover-up" interfering with the parties' *meaningful* access to the courts. In *Lewis v. Casey*, 116 S. Ct. 2174 (1996), this Court reaffirmed a constitutional prerequisite to prevailing on a "denial of access" claim is that the plaintiff establish *actual* injury. In the context of *Lewis*, this Court specifically noted an actual injury could exist *only* if the party could demonstrate a non-frivolous legal claim had been frustrated or was being impeded. 116

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[12] Thus, this Court has already had the opportunity to consider this precise issue emanating from the Ninth Circuit and has declined to exercise its jurisdiction for certiorari. It is submitted the instant situation is not different and, therefore, certiorari should be denied.

S. Ct. at 2180-81. This Court further noted the constitutional right to access to the Court does not extend to enable a plaintiff to discover grievances or litigate effectively once in court. *Id. See also Bounds v. Smith,* 430 U.S. 817 (1977). Thus, the Ninth Circuit decision in this regard simply conforms with the pronouncements of this august body that an actual injury be established by showing the court that a non-frivolous legal claim had been frustrated or was being impeded. The decision by the Ninth Circuit is, at this early date, that actual injury is impossible to establish. Therefore, the matter is not yet ripe for consideration.

Petitioners claim their access to the court was denied and that the state judicial process does not allow them to remedy the wrong alleged. However, *proof* of a lack of adequate state remedies is required by *Hudson v. Palmer,* 468 U.S. 517 (1984), in procedural due process and judicial access cases. Obviously, the federal "right of access to the courts" is not abridged when state court remains just as open to provide a remedy as the federal courts. *See Foster v. City of Lake Jackson,* 28 F.3d 425, 430 (5th Cir. 1994).

III. THE MAJORITY OF CIRCUITS CORRECTLY AGREE WITH THE NINTH CIRCUIT

This same concept was clearly understood by the Fifth Circuit in *Ryland v. Shapiro,* 708 F.2d 967, 974 (5th Cir. 1983). That decision limited the "interference" associated with an alleged "cover-up" to the filing of a complaint. This position was recently reasserted in *Foster,* 28 F.3d at 430 n. 7. The Seventh Circuit reached a similar

conclusion in *Thompson v. Boggs*, 33 F.3d at 847, 852-53 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995), where it held the actions did not amount to denial of right of access to the courts because the plaintiff had sufficient facts to properly file a lawsuit.[13] Likewise, in *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995), the Court found there was no constitutional injury where the plaintiff did not claim to have been prevented from pursuing the tort action, or could not prove the value of that action was reduced by the cover-up. In *Waller v. Butkovich*, 584 F. Supp. 909 (M.D.N.C. 1984), the Court – addressing the effect of a "cover-up" – stated:

> The plaintiffs have great difficulty in proving that they were damaged significantly in these respects. The very fact that they were able to institute this suit goes a long way toward proving the conspiracy to prevent them from obtaining legal redress was unsuccessful, if indeed, there was such a conspiracy. The plaintiffs, of course, were not entitled to have the defendants do investigatory work for them, nor to have the defendants notify them of the existence of a cause of action.

584 F. Supp. at 941.

In *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998), the Sixth Circuit identified the steps to be taken in analyzing whether an individual's fundamental right of access to the courts has been violated. Initially, the court must determine whether

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[13] Again, as with the prior Ninth Circuit case, this Honorable Court had a chance to consider these issues on a Writ of Certiorari and has denied them.

the abuse occurred pre- or post-filing. 119 F.3d at 1263. If pre-filing (as is the situation here), the "plaintiff must establish that the abuse denied her 'effective' and 'meaningful' access to the courts." *Id.* This fact can only be established by showing the actions of the defendants foreclosed her from filing a suit in state court or rendered ineffective any state court remedy she previously may have had. *Id.* at 1264.

In this case, the Ninth Circuit Court of Appeals made the reasoned decision that, assuming a claim for "cover-up" conspiracy could be established, it would have to be done in the context of an impairment to the state law proceeding. Since DELEWS have not been impaired at the present time in the course of their state law proceeding, they have not yet suffered an injury.

As noted, the basic purpose of a § 1983 damages award is to compensate persons for injuries caused by deprivations of constitutional rights. When a person seeks damages, the level of damages is ordinarily determined according to principles derived from the common law of torts. *Memphis Community School District v. Stachura*, 477 U.S. 299, 306 (1986). Accordingly, plaintiffs seeking relief must establish both causation and damages. *Myers v. Scott County*, 868 F.2d 1017 (9th Cir. 1989).

With respect to recovery of damages, in order to justify a monetary judgment, the amount would reflect the substance of damages – as proved by substantial evidence. In other words, the law does not permit arriving at monetary award of damages by pure conjecture. *Kelly Broadcasting Co., Inc. v. Sovereign Broadcast, Inc.*, 96 Nev. 188, 606 P.2d 1089 (1980). *See Butler v. Dowd*, 979 F.2d

661 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2395 (1993). In Nevada, "where damage has not been sustained or where it is too early to know whether damage has been sustained" an action for damages is premature and should be dismissed. *Semenza v. Nevada Medical Liability Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988). Causes of actions do not accrue until damages are certain and not contingent. *Id. See also Alper v. Stillings*, 80 Nev. 84, 86-87, 389 P.2d 239, 240 (1964).

In the instant case, DELEWS have already been allowed to file their lawsuit. They have access to the court – *meaningful* access to the court at the present time. At best, the rather pallid arguments regarding a lessening of the damage amount they would ultimately be capable of receiving is ambiguous and can only be resolved at the conclusion of trial.[14]

Of course, in this case, WAGNER is virtually impecunious and has, as her only meaningful asset, a vehicular insurance policy. It is LVMPD's understanding that, in the course of the state law proceeding, the full amount of that policy has already been tendered in an attempt to resolve that litigation. Arguably, an award in excess of that insurance policy amount would still be a greater award than that which Petitioners could ever hope to receive from

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[14] Of course, this argument raises the interesting question that since Petitioners have the ability and the opportunity to challenge the veracity of the investigating officers and WAGNER, herself, at the time of the state law trial, a decision by the state law court that the officers and Ms. WAGNER are being truthful would appear to be fatal to Petitioners' claim.

WAGNER. This fact further destroys the validity of Petitioners' claims. Therefore, dismissal without prejudice was completely appropriate.

IV. DELEWS' CITED CASES ARE INAPPOSITE

As already indicated to this Court, other Circuits – such as the Fifth, Sixth, and Seventh, agree with the position taken by the Ninth Circuit that "meaningful access" to the courts requires more than simple lip service. In order to support their contention the Ninth Circuit ruling is contrary to established precedent, Petitioners misstate the holding of *Bell*.[15]

In *Bell*, it was alleged that officers had engaged in a subsequent cover-up to hide the true facts of the murder of a private citizen. The state action ended in a mistrial and was ultimately settled between the parties. Roughly twenty (20) years thereafter, one of the police officers involved in the cover-up confessed to what actually occurred. Immediately another wrongful death action was brought. The problem in *Bell* was that the officers were directly involved in the death of the individual and, therefore, were the only witnesses to the event. Thus, by their own efforts, they could completely foreclose investigation. None of those facts are operative here.

By the same token, Petitioners miscite *Ryland*. In that case, the cover-up of crucial information resulted in the

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[15] In citing *Bell*, Petitioners ignore the more recent Seventh Circuit case already cited to this Court of *Thompson* which sustains the Ninth Circuit's decision. Therefore, the application of *Bell* in making this decision is highly suspect.

state court litigation being dismissed for failure to present sufficient evidence. Again, that case is inapposite to the facts before this Court.

Even if these two decisions were applicable to the case at bar, the analysis underlying those decisions is flawed. This violation occurs only when parties have conspired to act in a manner so as to disguise or so as to keep the victim, or the victim's family, from discovering the "true" facts of the event for which the plaintiff is ultimately seeking relief. However, even the best laid conspiracy is of no avail unless it effectively forecloses that avenue of redress. Until some damage can be shown (such as the inability to file a lawsuit within an applicable statute of limitations, the wrongful imposition of criminal charges upon an innocent party, or the inability to recover monies from litigation based solely on the lies of the conspirators) then the aims of the conspiracy have not been realized and, therefore, a *constitutional* cause of action for conspiracy is simply not yet ripe for adjudication.

CONCLUSION

For the foregoing reasons, LVMPD Respondents respectfully requests this Court deny Petitioners' Petition for Writ of Certiorari and allow the Ninth Circuit decision to stand – to the extent it does not wish to reconsider the Ninth Circuit's position in light of the pending Conditional Cross-Petition for Writ of Certiorari.

Respectfully submitted this 14th day of October, 1998.

RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX

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APPENDIX

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY, Plaintiffs, vs. JANET KATHLEEN WAGNER, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, STATE OF NEVADA, EX REL., NEVADA HIGHWAY PATROL, LIEUTENANT EDWARD JENSEN, SERGEANT RICHARD WOMACK, SERGEANT CURTIS ALBERT, SERGEANT THOMAS HARMON, DETECTIVE RICHARD HART, DETECTIVE WILLIAM JOHNSON, OFFICER WILLIAM SMITH, OFFICER KEITH BOWERS, OFFICER DAVID	CASE NO. A364616 DEPT NO. II DOCKET NO. D COMPLAINT (Filed Sep. 26, 1996)

WAGNER AND OFFICER GREG)
GOEN, SERGEANT WILLIAM)
ADAMSON, SERGEANT HARVEY)
WEATHERFORD, TROOPER)
JOSEPH A. SMITH, TROOPER)
GARTH GARDNER, TROOPER)
JOSEPH WYNGARD AND)
TROOPER JAMES BRANNUM.)
DOES I through XX inclusive, and)
ROE CORPORATIONS XX through)
XXX.)
Defendants.)
)

COMES NOW the above-captioned Plaintiffs, by and through their attorneys, and for causes of actions against the above-captioned Defendants allege as follows:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

A. PARTIES

1. Plaintiff Michael C. DeLew is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

2. Plaintiff Michael C. DeLew is the husband of Erin Rae DeLew and was appointed by the Court to serve as the Special Administrator of the Estate of Erin Rae DeLew on November 10, 1994.

3. Plaintiff H. Roy Mayberry is the father of Erin Rae DeLew and is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

4. Plaintiff Vickie Mayberry is the mother of Erin Rae DeLew and is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

5. Defendant Janet Kathleen Wagner is now, and at all times relevant hereto has been, a resident of Clark County, Nevada.

6. Defendant Las Vegas Metropolitan Police Department was created pursuant to NRS 280.010 *et seq* as a merged police department of the City of Las Vegas and Clark County. NRS 280.280.4 provides that Department may sue or be sued with regard to any act or omission to act on the part of the sheriff, or an officer, employee or agent of the Department.

7. The Nevada Highway Patrol was created by the Nevada legislature in NRS. 481-130 as a division within the State of Nevada Department of Motor Vehicles.

8. Defendants Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner and Officer Greg Goen are police officers of the Las Vegas Metropolitan Police Department and believed to be residents of Clark County, Nevada.

9. Defendants Sergeant William Adamson, Sergeant Harvey Weatherford, Officer Joseph A. Smith, Officer Garth Gardner, Trooper Joseph Wyngard and Trooper James Brannum are law enforcement officers of the Nevada Highway Patrol and believed to be residents of Clark County, Nevada.

10. At all times mentioned herein Defendant Las Vegas Metropolitan Police Department was a municipal corporation of the State of Nevada, and was the employer of Defendants Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner and Officer Greg Goen and provided each of these Defendants with an official badge and identification card which designated and described its bearer as a police officer of the Las Vegas Metropolitan Police Department. The City of Las Vegas is the municipal corporation in whose name the individual police officer Defendants, and each of them, performed all acts and omissions alleged here.

11. At all times mentioned herein Defendant Nevada Highway Patrol was a municipal corporation of the State of Nevada, and was the employer of Defendants Sergeant William Adamson, Sergeant Harvey Weatherford, Officer Joseph A. Smith, Officer Garth Gardner, Trooper Joseph Wyngard and Trooper James Brannum and provided each of these Defendants with an official badge and identification card which designated and described its bearer as a officer of the Nevada Highway Patrol. The Nevada Highway Patrol is a municipal corporation in whose name the individual police officer Defendants, and each of them, performed all acts and omissions alleged herein.

12. DOES I through XX, inclusive, and ROE Corporations XX through XXX are named as Defendants for individual parties or corporations/partnerships that may be identified during the course of this action. Specifically

there may be additional Metropolitan Police Officers or Highway Patrol Troopers, or agents or representatives or theirs who may have come in contact with evidence or witnesses and thereafter participated in covering up the facts. Upon such occasions, Plaintiffs shall seek leave of the Court to substitute such party or corporation/partnership for the DOES or ROE Defendants.

B. FACTUAL ALLEGATIONS

13. On September 27, 1994 at approximately 7:15 p.m., Erin Rae DeLew, who was married to Plaintiff, Michael C. DeLew, was riding her bicycle in the vicinity of West Lake Mead Boulevard and Ridgemoor Street.

14. At the same time referenced above, the Defendant, Janet Kathleen Wagner, was operating a motor vehicle registered in her husband's name in the same vicinity as referenced above.

15. Janet Kathleen Wagner caused the vehicle that she was operating to collide with Erin Rae DeLew and her bicycle, causing Erin Rae DeLew to be projected approximately sixty (60) feet from the point of impact inflicting numerous lacerations, contusions, and head injuries, upon her, and causing her death.

16. At the time of the subject accident, Janet Kathleen Wagner was operating her vehicle in a reckless and negligent fashion, including, but not limited to, driving her vehicle at a minimum of thirty (30%) percent higher than the maximum posted speed limit.

17. At the time of the subject accident, Janet Kathleen Wagner was operating her vehicle after having

willfully and negligently consumed alcohol and was illegally under the influence of alcohol at the time of the subject accident.

18. After the traffic collision between Erin DeLew and Defendant Janet Wagner, no fewer than 15 law enforcement officers of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol responded to the scene of the fatal investigation, some within a few minutes of the collision and prior to Erin DeLew's death.

19. Immediately upon their arrival at the scene of the collision, and prior to Erin Delew's death, Defendant METRO and NHP officers realized that Defendant Officer David Wagner's wife, Defendant Janet Wagner, had been drinking alcoholic beverages, had been driving her vehicle at speeds in excess of 30% of the posted speed limit, and had violated the right-of-way of Erin DeLew causing Erin DeLew's death. Defendant police officers realized that Plaintiffs' daughter and wife, respectively, was fatally injured.

20. Officer Wagner's wife, Janet Wagner, admitted that prior to the fatal collision she had been drinking alcoholic beverages. All of the Defendant police officers had substantial experience in the administration of field sobriety tests, yet took no action to personally determine Janet Wagner's sobriety or level of intoxication.

21. Pursuant to the Las Vegas Metropolitan Police Department policy of investigating traffic accidents and criminal incidents involving fellow police officers and their immediate family members, and despite the patent conflict of interest, Defendant METRO police officers, who were clothed with decision-making authority with

respect to the investigation, proceeded to cover-up the truth of Erin DeLew's death.

22. Beginning immediately upon their arrival at the scene of the fatal traffic collision, and prior to Erin DeLew's death, and continuing until the present time, Defendants deliberately and willfully sought to cover up The facts surrounding the death of Plaintiffs' daughter and wife, respectively, in order to protect the wife of their fellow police officer. Defendant Officer Wagner, from criminal and civil prosecution for causing the death of Erin DeLew in violation of Plaintiffs' constitutional rights. By so doing, Defendants intentionally interfered with the Plaintiffs' right of meaningful access to courts, protected by the U.S. Constitution, as more fully described below. These acts and omissions, which were undertaken in reckless disregard and callous indifference to Plaintiffs' rights, include the following:

a. Deliberately refraining from performing a field sobriety test upon Officer David Wagner's wife, Janet Wagner, despite the fact that (1) Janet Wagner smelled of alcohol; (2) Janet Wagner admitted to drinking alcohol just prior to the fatal collision; and (3) Janet Wagner had been speeding, had made an erratic lane change, and had violated Erin DeLew's right-of-way causing the death of Erin DeLew;

b. Deliberately refraining from performing a chemical blood alcohol test within two hours of the fatal traffic collision;

c. Failing to accurately record statements of all percipient witnesses, and fabricating other portions of these witness statements;

d. Failing to preserve and record physical evidence at the scene of the accident including skid marks, relevant debris and Janet Wagner's level of intoxication;

e. Allowing Defendant Janet Wagner to leave the scene of the fatal collision during the investigation;

f. Making misrepresentations to Plaintiffs, both oral and via the traffic collision report, regarding the facts surrounding their daughter's and wife's death;

g. Making misrepresentations to the Coroner's Office investigator regarding the facts of the fatality and concealing material information from the Coroner's Office;

h. Issuing a false and fraudulent report claiming Plaintiffs' daughter and wife, respectively, was responsible for her own death by making an unsafe lane change with little or no basis for so concluding, and causing the same to be published in newspapers; and

i. Covering up the fraudulent investigation conducted concerning Erin DeLew's death and thereby implicating themselves in the continuing conspiracy to violate Plaintiffs' constitutional rights; and

j. Failing and refusing to take two blood draws separated by time when the blood draw was finally taken.

23. As a result of Defendants actions and inaction described above and below, Plaintiffs have been injured and caused to suffer as follow:

a. Emotional distress, grief, aggravated grief and related damages;

b. Loss of consortium and companionship;

c. Economic losses;

FIRST CAUSE OF ACTION
(Violation of 42 U.S.C. 1983)

24. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 23 above as fully set forth herein.

25. This cause of action is to redress the deprivation under the color of statute, ordinance, regulation, policy, custom, practice or usage of a right, privilege, and unity secured to Plaintiffs by the First, Fifth and Fourteenth Amendments to the Constitution of the United States (42 USC § 1983).

26. Plaintiffs are members of a class of pe sons involved in traffic incidents or criminal incidents with members or family members of the Las Vegas Metropolitan Police Department or the Nevada Highway Patrol.

27. Defendant police officers, while clothed with authority as police officers and acting under color of state law, covered up the true facts of Erin DeLew's death in order to protect Janet Wagner from criminal and civil liability for Erin's death. Defendants, through their actions, inaction, and acquiescence, used their power and position to violate Plaintiffs' constitutional rights by covering up the fact that Janet Wagner caused the death of Erin DeLew.

28. The facts alleged above are part of the customs, practices, policies and decisions of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol including, but not limited to, the following:

a. Inadequately and/or fraudulently investigating allegations of criminal and civil misconduct involving fellow law enforcement officers and their immediate family members, in order to cover-up and protect fellow police officers and their relatives from disciplinary, criminal and civil actions;

b. Covering up the criminal and/or wrongful activities of fellow law enforcement officers and their immediate family members by false reporting, false investigating, perjury and dishonesty;

c. Refusing to supervise, reprimand and/or discipline law enforcement officers who engage in misconduct, whether on or off duty;

d. Investigating traffic and criminal incidents involving fellow law enforcement officers and their immediate family members;

e. Failing to administer adequate and standard field sobriety tests to fellow law enforcement officers or their immediate family members suspected of driving under the influence; in effect, giving preferential treatment to fellow police officers and their immediate family members;

f. Failing to enforce the law, rules, regulations and procedures when an investigation is conducted of a fellow law enforcement officer's misconduct, or a relative of a fellow police officer, and therefore, denying Plaintiffs

and similarly situated citizens equal protection of the laws and meaningful and unimpaired access to the courts as provided in the U.S. Constitution;

g. Inadequately training and supervising police. officers with respect to the investigation of misconduct by fellow law enforcement officers or their immediate family members;

h. Choosing a policy of not implementing procedures and policies that would prevent law enforcement officers from impartially investigating misconduct, including criminal, traffic and other wrongful incidents, involving fellow officers and/or their immediate family members; and

i. Tacitly approving of police officers using their power and position to protect fellow law enforcement officers and their relatives through preferential treatment resulting in interference with other citizens' rights, including the right to meaningful access to courts, as described more fully below.

j. Defendants chose to consciously implement the above customs and policies from various available alternatives.

29. Each of the individual Defendants and METRO and the NHP separately and in concert, acted willfully, knowingly, with reckless disregard and deliberate indifference, and purposefully with the intent to deprive Plaintiffs of their rights and privileges, and did in fact violate:

a. Plaintiffs' substantive right to meaningful and unimpaired access to courts as protected by Article 4 of the Constitution and the Fourteenth Amendment;

b. Plaintiffs' right to petition the government for redress of grievances without interference as protected by the First Amendment right to petition;

c. Plaintiffs' right to present to the judiciary allegations concerning violations of fundamental constitutional rights without impairment or interference as protected by the Due Process Clause of the Fifth and Fourteenth Amendment;

d. Plaintiffs' constitutionally protected right to prosecute without impairment or interference a wrongful death suit for the death of their daughter and wife, respectively, in Nevada State Court;

e. Plaintiffs' right to substantive due process of law, including the right to be free of arbitrary and abusive assertion of governmental power, to be treated with fundamental fairness by governmental authorities, and to maintain their personal integrity and dignity as parents and citizens;

f. Procedural due process of law, including the right to have had a fair and partial investigation of the death of their daughter and wife, respectively, and to have had notice and an opportunity to be heard before METRO and the NHP impaired their property interest to seek total and full redress for Erin DeLew's wrongful death; and

g. Equal protection of the law, including the right to have had a fair and impartial investigation of the death of

their daughter and wife, respectively, and to have the laws equally applied to them.

h. All of the above rights and privileges are secured to Plaintiffs by the provisions of the First Amendment and the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, and by Title 42, United States Code Section 1983.

30. The above acts or omissions of Defendant police officers, both formal and informal, were undertaken while under color of state law and resulted in the violation of Plaintiffs' constitutional rights. Likewise, the customs, practices, policies and decisions of METRO and the NHP alleged herein and as applied to Plaintiffs, resulted in violation of Plaintiffs' constitutional rights as stated herein.

31. Despite the fact that they knew or should have known of the fact that these acts, omissions, decisions, practices, customs and policies, both formal and informal, were being carried out by their agents and employees, METRO and the NHP have taken no steps or efforts to order a halt to this course of conduct, to make redress to these Plaintiffs or other citizens injured thereby, or to take any disciplinary action whatsoever against any of their fellow law enforcement officers. In effect, Defendants METRO and the NHP have ratified the wrongful conduct and custom resulting in violation of Plaintiffs' civil rights.

32. As a direct and proximate result of the aforesaid acts, omissions, customs, practices, policies and decisions of the individual police officer Defendants, METRO and the NHP, and each of them, Plaintiffs suffered great mental anguish, fright, nervousness, anxiety, grief, shock,

humiliation, loss of consortium, indignity, embarrassment, apprehension all to their damage in a sum to be determined at trial. Plaintiffs have been greatly humiliated a result of the foregoing acts of the Defendants. Plaintiffs have been forced to incur substantial obligation for attorney's fees, court reporter's fees, investigation expenses, and other expenses in the vindication of their constitutional rights.

33. Defendants' actions were attended by circumstances of malice, insult and a reckless disregard for the rights and feelings of Plaintiffs.

SECOND CAUSE OF ACTION
(Conspiracy to Violate 42 U.S.C. 1983)

34. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 33 above as fully set forth herein.

35. This cause of action is to redress the deprivation under the color of statute, ordinance, regulation, policy, custom, practice or usage of a right, privilege and immunity secured to Plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States by virtue of a conspiracy between Defendants Janet Wagner, David Wagner, the Las Vegas Metropolitan Police Department, State of Nevada, ex rel., the Nevada Highway Patrol, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer Greg Goen, Sergeant William Adamson, Sergeant Harvey Weatherford, Trooper Joseph A. Smith, Trooper Garth

Gardner, Trooper Joseph Wyngard and Trooper James Brannum, Does I through XX inclusive, and Roe Corporations XX through XXX, to cover up the true facts of Erin DeLew's death to protect Janet Wagner from criminal and civil liability for Erin's death.

36. During all times mentioned herein, the individual named law enforcement officers and each of them, separately and in concert, acted under color and pretense of law, under color of the statutes, ordinances, regulations, policies, practices, customs and usage's of the State of Nevada, the County of Clark and City of Las Vegas. Each of the individual Defendants here, separately and in concert, engaged in the illegal conduct here mentioned to the injury of Plaintiffs and deprived Plaintiffs of the rights, privileges, and immunities secured to Plaintiffs by the First, Fifth and Fourteenth Amendments to the Constitution of the United States and the laws of the United States, as identified above.

37. On and after September 27, 1994, at said time and place, and thereafter, while investigating the incident described herein, Defendants, members of METRO and NHP, including Defendant law enforcement officers, and DOES I-XX and XX-XXX, and each of them, while acting under the color of state law, consciously, willfully, maliciously and intentionally conspired to protect fellow Officer's David Wagner's wife, Defendant Janet Wagner, from, civil and criminal liability by covering up the true facts of Erin DeLew's death These acts, as more fully described above, include refraining from administering a field sobriety test to Officer's David Wagner's wife or a blood alcohol test within two hours of the collision, or two blood draws separated by time, intentionally and

willfully refraining from collecting and recording other evidence at or near the scene of the accident, including witness statements, skid marks, point and area of impact, and Janet Wagner's level of intoxication.

38. Defendants overtly acted in furtherance of this conspiracy by undertaking the acts described above.

39. Defendant METRO police officers and Defendant NHP officers were clothed with the power and authority of Clark County, the City of Las Vegas, and the State of Nevada, respectively, to make decisions on behalf of these public entities. By virtue of this delegated power and authority, these Defendants furthered the conspiracy in such fashion that the conspiracy became an informal decision, practice or policy of Clark County, the City of Las Vegas, and State of Nevada.

40. Defendants consciously, intentionally, willfully. and deliberately conspired and continued to conspire and agree among themselves to damage Plaintiffs by consciously, intentionally, willfully, and deliberately destroying, altering, fabricating and/or failing to note and/or record evidence, in furtherance of the conspiracy to violate Plaintiffs' civil rights. Moreover, Defendants' conspiracy was executed pursuant to the customs and policies identified above resulting in violations of Plaintiffs' constitutional rights. Defendants chose to consciously implement these customs and policies from various available alternatives.

41. The above acts or ommissions of Defendant police officers, both formal and informal, were undertaken while under color of State law and resulted in the violation of Plaintiffs' constitutional rights. Likewise, the

customs, practices, policies and decisions of METRO and NHP alleged herein and as applied to Plaintiffs, resulted in violation of Plaintiffs' Constitutional rights as identified above.

42. The above acts, omissions, customs, practices and/or decisions of METRO and the NHP, while carried out under color of state law, have no justification or excuse in law, and instead constitute a gross abuse of governmental authority and power, shock the conscience, are fundamentally unfair, arbitrary and oppressive, and unrelated to any activity in which police officers may appropriately and legally engage in the course of protecting persons or property, or ensuring civil order. The above acts, omissions, decisions, customs, practices, or policies were consciously chosen from among various alternatives.

43. As a direct and proximate result of the conspiracy to violate their constitutional rights, Plaintiffs have suffered great mental anguish, fright, nervousness, anxiety, grief, shock, humiliation, indignity, embarrassment, apprehension all to their damage in a sum to be determined at trial. Plaintiffs have also been forced to incur substantial obligations for attorney's fees, court reporter's fees, investigation expenses, and other expenses in vindication of their constitutional rights.

44. Defendants' actions were attended by circumstances of malice, insult and a reckless disregard for the rights and feelings of Plaintiffs.

WHEREFORE, Plaintiffs pray for judgment in favor of Plaintiffs, and against Defendants, as follows:

FIRST CAUSE OF ACTION

1. For special damages in an amount in excess of $10,000.00;

2. For general damages for each Plaintiff in an amount in excess of $10,000.00;

3. For exemplary damages, in an amount to be determined by the trier of fact.

4. For attorney's fees and costs; and

5. For such other and further relief as this Court deems just and proper.

SECOND CAUSE OF ACTION

1. For special damages in an amount in excess of $10,000.00;

2. For general damages for each Plaintiff in an amount in excess of $10,000.00;

3. For exemplary damages in an amount to be determined by the trier of fact.

4. For attorney's fees and costs; and

5. For such other and further relief as this Court deems just and proper.

DATED this 26th day of September, 1996.

Respectfully Submitted,

FOLEY & JONES

A PROFESSIONAL CORPORATION

/s/ Daniel T. Foley

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL C. DELEW, individually and MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY, Plaintiffs, vs. JANET KATHLEEN WAGNER, and DOES I through V inclusive, and ROE CORPORATIONS V through X, Defendants.	Case No. A364616 Dept. No. II Docket No. D

MOTION TO DISMISS

(Filed Jan. 24, 1997)

Date of Hearing: 2/20/97

Time of Hearing: 9 AM

COMES NOW, the Defendant, JANET KATHLEEN WAGNER, by and through her attorneys and moves this

Honorable Court pursuant to the provisions of NRCP 12(b) and 56(b) for an order dismissing the Plaintiffs' Complaint on file herein.

This motion is made on the grounds that the Plaintiffs cannot state a valid cause of action and on the further grounds that there is no undisputed issues of fact relevant to a final judgment in this action.

This motion is made and based on all files, pleadings and records on file herein together with the points and authorities attached hereto.

EDWARDS & HALE, Ltd.

By /s/ Keith Edwards, Esq.
KEITH EDWARDS, ESQ.
Nevada Bar #002299
Attorneys for Defendant,
Janet Kathleen Wagner
415 South Sixth Street, #300
Las Vegas, Nevada 89101

NOTICE OF MOTION

TO: Plaintiffs above-named; and

TO: DANIEL T. FOLEY, ESQ., their attorney;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Dismiss on for hearing before the above-entitled Court on the 20 day of February, 1997, at the hour of 9:00 o'clock in the forenoon said date in Department No. II.

DATED this 23rd day of January, 1997.

EDWARDS & HALE, Ltd.

By /s/ Keith Edwards
KEITH EDWARDS, ESQ.
Nevada Bar #002299
Attorneys for Defendant,
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POINTS AND AUTHORITIES

On or about September 27, 1997 Janet Rae Delew was riding her bicycle across Lake Mead Boulevard and rode into the path of the vehicle operated by the Defendant JANET WAGNER, where she was struck and killed. On November 10, 1994 a civil action was filed in the District Court for Clark County, Nevada by the heirs of Janet Rae Delew against Defendant JANET WAGNER alleging negligence and intoxication on the part of the defendant. That matter proceeded in normal course and extensive discovery followed including the depositions of over twenty potential trial witnesses or investigators of the accident. The depositions that were taken include the depositions of all but one of the defendants now named in this action. After taking the depositions of all of the officers at the scene of the accident and on the eve of the statute of limitations the plaintiffs filed a motion to amend their complaint to join the investigating officers as parties. The motion was denied and this new and separate action followed.

Clearly erroneous allegations

Apparently in an attempt to state a cause of action under 42 USC § 1983 the plaintiff has alleged:

> 19. Immediately upon their arrival at the scene of the collision, and prior to Erin Delew's death, defendant METRO and NHP officers realized that Defendant Officer David Wagner's wife, Defendant Janet Wagner, had been drinking alcoholic beverages, had been driving her vehicle at speeds in excess of 30% of the posted speed limit, and had violated the right-of-way of Erin DeLew causing Erin DeLew's [sic] death. Defendant police officers realized that Plaintiffs' daughter and wife, respectively, was fatally injured.

There appears to be an inconsistency in the allegations which state that the officers arrived at the scene "prior to Erin Delew's death" and then allege in the same paragraph that the "defendant police officers realized that [Erin Delew] was fatally injured." The issue of the time of Mrs. Delew's death has some bearing on a § 1983 action and is resolved very quickly by the testimony of the first witness at the scene of the accident.

Robert A. McNeese was a Lieutenant Colonel in the Air Force assigned to Nellis Air Force Base. At the time of the accident he was walking his dog when he heard a noise, knew an accident had occurred and ran to the scene. He stated that he was the first person at the scene. Deposition transcript pp. 12-13. After arriving at the scene he went directly to the victim. He testified as follows:

Q. With respect to the victim, were you able to render any assistance?

A. I felt for pulse. Couldn't find a pulse. I listened for breathing. Couldn't hear a heartbeat. Couldn't hear any breath, you know, with my ear up to her back as she was laying face down. There was a lot of blood loss, a massive head wound. And I checked her pupils and although I'm not a medical person, I have seen fatalities before, and I determined in my mind that she was a fatality. When I got to her, her eyes were – her pupils were fixed and dilated, and that usually a pretty good sign of no brain activity.

Q. Did you have any conversations with anybody at the scene?

A. Yes. I had a conversation with my wife because she came over when I told her that I couldn't find a pulse and she felt for a pulse both on the writs and on the victim's neck, and my wife thought she felt a very, very faint pulse, and it may have just been some residual. I don't think it wasn't a strong strong pulse. We had that conversation. And then another woman who I believe was the woman on the bicycle came into the street and she was suggesting that we try to give the victim CPR and I disagreed with her. I said I didn't think it would do any good because I thought the person was already dead and besides the fact that there's a bad trauma to the head and she's laying on her stomach and you'd have to roll her over to do CPR and that could create more problems with a head or neck injury, and we should probably just wait and before the police arrive and before

> the ambulance arrived two gentlemen were jogging by, running by. Both of them ran over and asked what's going on?" and one of them said, "I'm a doctor." And he bent down over the – called her the body and said, "I think she's dead." And he did the same thing, lifted up her eyelid and looked at her eyes and he said, "Yes, I think she's dead. There's nothing that can be done for her here." And I said, "The ambulance is on the way and the police are on the way." And he said, "fine," and continued to run up the street. Deposition pp. 18-20 (See Exhibit "A").

The witness went on to explain that a single patrolman arrived at the scene checked the victim and indicated that nothing could be done for her. An emergency vehicle then arrived, hooked up a small portable EKG and got a flat line and "they said she was deceased at that point." (Deposition p. 22).

There is no 42 USC § 1983 cause of action

The foregoing is of significance because of the claim that Mrs. Delew's civil rights were violated. However, the First Cause of Action of the Complaint is not directed at Mrs. Wagner. The plaintiffs appear to have recognized that by its terms, § 1983 applies only to individuals acting "under color" of law. In other words, a defendant cannot be held liable under 1983 unless his actions can be "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). Perhaps that is why Janet Wagner is only referred to peripherally in the First Cause of Action.

The Ninth Circuit Court of Appeals has ruled that the civil rights of a person cannot be violated after the death of that person. *Estate of Cartwright v. City of Concord*, 618 F. Supp. 722 (ND CA.1985), aff'd 856 F.2d 1437 (9th Cir. 1988).

> Defendants argue that no post-death events could legally interfere with plaintiffs' alleged constitutional rights, under the authority of Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979); Whitehurst v. Wright, 592 F.2d 834, 840-841 (5th Cir. 1979); McQurter v. City of Atlanta, 572 F. Supp. 1401, 1419 (N.D. Ga. 1983). Those authorities are persuasive that the civil rights of a person cannot be violated after death, and therefore the scope of an investigation after death is not actionable.
>
> Plaintiffs' response is that the lack of thoroughness of the investigation was a policy of defendants, which policy existed prior to Cartwrights' death, and that the policy resulted in procedures which insulated the city and its personnel from liability for violations of constitutional rights. See Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982), aff'd in part on rehearing, 739 F.2d 99 illegible Cir. 1984). See also Gomez v. Whitney, 757 F.2d 1005 (9th Cir. 1985).

The court rejected the claim that the defendants' inadequate investigation and failure to preserve evidence deprived her of a constitutional right. *Id.* at 730. In affirming the lower court decision the Ninth Circuit Court of Appeals specifically also rejected the claim that there had been a deprivation of a constitutional right. See 856 F.2d at 1438.

The Ninth Circuit has also ruled that there is no constitutional right "to have a full and fair police investigation into violence done against themselves or their children." In the case of *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1984), the plaintiffs brought an action when their son died as a result of an apparent accident while trespassing on a construction site with two other juveniles. The police conducted a cursory investigation and decided not to recommend that any charges be brought against the decedent's companions. When Mr. Gomez, Sr. was unable to convince the police department to re-open the investigation he filed an action claiming that his family's civil rights had been violated by the police department's inadequate investigation. In affirming the district court's dismissal of the case the appellate court said:

> A prerequisite to recovery under the Civil Rights Act, *42 U.S.C. § 1983*, is that the plaintiff prove that the defendants deprived him of a right secured by the Constitution and the laws of the United States. *Martinez v. California*, 444 U.S. 277, 284, 62 L.Ed. 2d 481, 100 S. Ct. 553 (1980). A threshold question in this appeal, then is whether or not the appellants' claim involves the deprivation of a protected right.
>
> The appellants claim that the right infringed was a due process right to have a full and fair police investigation into violence done against themselves or their children. However, we can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved. See, e.g., *Smith v. Ross*, 482 F.2d 33 (6th

Cir. 1973) (police failure to protect against housing discrimination).

> Because the appellants have failed to state facts that constitute the infringement of a protected right, their § 1983 claim must necessarily fail, and the district court was consequently correct in granting summary judgment against them. The judgment of the district court is therefore AFFIRMED.

The Plaintiffs' attempt to link the wrongful death action of Erin Delew to the subsequent police investigation is merely a veiled attempt to insert into this action facts which occurred after the accident which had nothing to do with the death of the bicyclist. The true nature of this action is best reflected by the eye witness who simply states that the bicyclist rode her bike across the path of an oncoming vehicle without looking (see Exhibit "B"). No matter what the police did or did not do after the accident will not change the actions of the bicyclist. However, if the Plaintiffs can insert enough extraneous and collateral facts into the case to make it appear that something in the investigation was done wrong, there might be enough to obscure the actions of the bicyclist and change the focus of the trial to one of investigative misconduct. The investigation has nothing to do with the wrongful death of the bicyclist.

There is no "Conspiracy to Violate 42 U.S.C. 1983" cause of action

Again for a conspiracy cause of action to have any substance the victim had to be alive when (as plaintiffs allege) "[d]efendant police officers realized that . . . [Erin

Delew] was fatally injured." (Complaint ¶ 19) If as alleged, the officers realized she was fatally injured, there was already a fatality and there is no violation of civil rights.

However, the allegations set forth in ¶¶ 34 through 44 fail to set forth any conduct of Defendant JANET WAGNER which indicated her knowledge or participation in any conspiracy. In fact that conspiracy claim seems to omit Mrs. Wagner when the Plaintiffs allege in ¶ 40:

> Moreover, Defendants' conspiracy was executed pursuant to the customs and policies identified above resulting in violations of Plaintiffs' constitutional rights. Defendants chose to consciously implement these customs and policies from various available alternatives.

Obviously Mrs. Wagner had no customs or policies which violated the plaintiffs constitutional rights; nor is she accused of participating [sic] the implementation of those customs and policies. In short the plaintiffs seem to aim their conspiracy action at the investigative agencies rather than at Mrs. Wagner.

In a somewhat analogous case of *Scott v. Dally*, No. 92-5006-CV-SW-1 (W.D. MO. 1992) the court observed that:

> Plaintiff has not alleged a conspiracy of any sort between the prosecutor and the individual defendants in this action. Indeed, the plaintiff alleges that defendant Gil Stevens, as a representative of defendant Brady Stevens Company, committed "perjury" when he presented his information to defendant Dally for prosecution.

> Rather than alleging any conspiracy or agreement between the defendants, plaintiff has alleged that one defendant (defendant Stevens) gave false information to another defendant (defendant Dally). Moreover, in her complaint, plaintiff makes absolutely no allegations whatsoever regarding defendant McMillan.

Similar to the *Scott* case the Plaintiffs have not alleged any overt action on the part of Mrs. Wagner. A conspiracy requires a willful participation by the participants in order to meet the requirements of 42 U.S.C. 1983. *Shipley v. First Fed. S & L Ass'n of Delaware*, 703 F. Supp. 1122 (D. Del. 1988).

Plaintiffs are attempting to split their cause of action

The Plaintiffs in this case filed a wrongful death action over two years ago against Janet Wagner. Now, after extensive discovery in that case, they seek to augment that action with this new and separate cause of action. It has long been established that a party may not split his cause of action. Louisiana courts hold that a plaintiff cannot split his claims for personal injuries and property damage arising from the same accident. *Fortenberry v. Clay*, La.App.1953, 68 So.2d 133; *Thompson v. Kivett & Reel, Inc.*, La.App.1946, 25 So.2d 124. In addition, in wrongful death cases courts forbid the survivor to split his damages and the decedent's damages. See *Reed v. Warren*, 1931, 172 La. 1082, 136 So. 59; *Norton v. Crescent City Ice Mfg. Co.*, 1933, 178 La. 135, 150 So. 855.

The issue was discussed in some depth in the case of *King Gen Contrs., Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 1991 Mo. App. LEXIS 444, (Court of

Appeals of Missouri, Western District, 1991). In that action the court observed:

> A cause of action which is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the merits in the first suit is a bar to a second suit. In general, the test for determining whether a cause of action is single and cannot be split is: 1) whether separate actions brought arise [*6] out of the same act, contract or transaction; 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions: The word "transactions" has a broad meaning. It has been defined as the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose. [Citations omitted].
>
> The cases dealing with res judicata and the splitting of a single cause of action apply the same standard as the compulsory counterclaim rule. In State ex rel. J.E. Dunn, Jr. & Associates, Inc. v. Schoenlaub, 668 S.W.2d 72, 75 (Mo. banc 1984), our Supreme Court said, in holding barred a claim which logically should have been presented as a counter claim in an earlier lawsuit:
>
> The clear function of the [complusory counterclaim] rule is to serve as "a means of bringing all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims."

As discussed above, the Plaintiffs' decision to willfully hold off on their 1983 action was fraught with error. They have attempted to prejudice Janet Wagner, but have acted

at their own peril. Their actions are improper and fail to follow the rules established by the courts.

Conclusion

As set forth above the Plaintiffs have misconstrued the facts, intermixed causes of action and failed to set forth facts necessary to support a 42 U.S.C. 1983 action against Mrs. Wagner. The cause of action represents an attempt on the part of the Plaintiffs to split their actions and use one for discovery and hold off on the other until they had obtained the depositional statements of the new defendants in order to prove up their new cause of action. The Plaintiffs seek to do by indirection that which cannot be done directly. Their action against Mrs. Wagner must fail.

Respectfully submitted,

EDWARDS & HALE, Ltd.

By /s/ Keith Edwards
KEITH EDWARDS, ESQ.
Nevada Bar #002299
Attorneys for Defendant,
Janet Kathleen Wagner
415 South Sixth Street, #300
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that I am an employee of EDWARDS & HALE, Ltd., and that on the 24th day of January, 1997, I deposited for mailing at Las Vegas, Nevada, a true and

accurate copy of the above and foregoing Motion to Dismiss addressed as follows:

DANIEL T. FOLEY, ESQ.
FOLEY & JONES
302 E. Carson Avenue, Suite 901
Las Vegas, Nevada 89101

/s/ Barbara E. Shank
BARBARA E. SHANK,
an employee of
EDWARDS & HALE, Ltd.

EXHIBIT A

[p. 18] involved in the accident, or at least it looked to me as if there had been drinking involved in the accident.

Q. Did you smell any alcohol on her breath?

A. No.

Q. Was her thought process logical?

MR. RASTELLO: No foundation, objection.

THE WITNESS: I couldn't say it was logical – whether it was logical or not.

Again she was, you know, just from my observation, I think she was in shock. She was in shock and didn't, you know, just didn't want to believe what had happened or, you know, was trying to comprehend what had happened, but she – I wasn't surprised at her conduct that,

you know, considering what just had happened. She acted like a lot of people would in the same situation.

BY MR. EDWARDS:

Q. With respect to the victim, were you able to render any assistance?

A. I felt for pulse. Couldn't find a pulse. I listened for breathing. Couldn't hear a heartbeat. Couldn't hear any breath, you know, with [p. 19] my ear up to her back as she was laying face down.

There was a lot of blood loss, a massive head wound. And I checked her pupils. And although I'm not a medical person, I have seen fatalities before, and I determined in my mind that she was a fatality. When I got to her, her eyes were – her pupils were fixed and dilated, and that's usually a pretty good sign of no brain activity.

Q. Did you have any conversations with anybody at the scene?

A. Yes.

I had a conversation with my wife because she came over when I told her that I couldn't find a pulse and she felt for a pulse both on the wrist and on the victim's neck, and my wife thought she felt a very, very faint pulse, and it may have just been some residual. I don't think – it wasn't a strong pulse.

We had that conversation. And then another woman who I believe was the woman on the bicycle came into the street and she was suggesting that we try to give the victim CPR and I disagreed with her. I said I didn't think it would do any good because I thought the person was

already [p. 20] dead and besides the fact that there's a bad trauma to the head and she's laying on her stomach and you'd have to roll her over to do CPR and that could create more problems with a head or a neck injury, and we should probably just wait.

And before the police arrived and before the ambulance arrived, two gentlemen were jogging by, running by. Both of them ran over and asked, "What's going on?" And one of them said, "I'm a doctor." And he bent down over the – called her the body and I said, "I think she's dead."

And he did the same thing; lifted up her eyelid and looked at her eyes and he said. "Yes, I think she's dead. There's nothing that can be done for her here." And I said, "The ambulance is on the way and the police are on the way." And he said, "Fine," and continued to run up the street.

Q. How do you know an ambulance and the police were on the way?

A. Well, I was assuming that because Mrs. Wagner had a cellular phone and I believe either she used it or someone else did. But a guy had driven up shortly after the accident in another car and he did have a cellular phone and he, I know, either [p. 21] called 911 or was using the cellular phone to call for help.

Q. Did you have any other conversations with anyone at the scene?

A. Various conversations with the ambulance people when they first got there, the first policeman on the scene, and I'm not real sure. I thought it was a motorcycle

patrolman because I thought he had a helmet on, but I'm not a hundred percent sure, but I know the policeman first got there. I was still with the victim and he came up and I told him what I thought, and he looked at the victim and felt for a pulse also and didn't think that there was anything that we could do for her at that point.

Q. Do you know if the police or the ambulance arrived first?

A. I believe the police arrived first. I think a single patrolman arrived – it seemed like a long time – 10 or 15 minutes after I had been there. And then a while after that before the ambulance showed up, another five to ten minutes, at least. It seemed like an eternity before a policeman showed up. I couldn't believe it was taking so long or [sic] an ambulance, anything.

[p. 22] Q. Do you know where the policeman had to come from?

A. No.

Q. Do you know where the closest – did paramedics come?

A. It was a normal orange and white square, you know, ambulance truck type ambulance with two technicians that came. They –

Q. Do you know if they were paramedics?

A. They acted like paramedics. They weren't like firemen type paramedics that you see when the fire department comes, but they had the same demeanor about them and pulled some equipment out of the ambulance. Did the same thing, checked for pulse, checked for

breath, and then they put a – looked like an EKG, small portable EKG machine out on the street. Hooked up the wires to the victim in the street to try to find, I believe, a heartbeat. You know, it was just a flat line, and they said she was deceased at that point.

Q. Do you know if – was there ever a blue and white ambulance that came to the scene?

A. I don't remember a blue and white ambulance. In my mind I see an orange and white ambulance but maybe that's because I see those all

* * *

EXHIBIT B

Page 1 of 2 VOLUNTARY STATEMENT 940927-1625

THIS PORTION TO BE COMPLETED BY OFFICER.

Specific Crime
Fatal Accident

Date Occurred
9-27-94

Time Occurred
1916

Location of Occurrence
W. Lake Mead East & Ridgemoor [X] City
[ ] County

Can You Identify the Suspect? [ ] Yes
[X] No

Name (Last/First/Middle)
Olsen Susie S.

Date of Birth
6-28-52

Social Security #
562-84-3019

Race	Sex	Height	Weight	Hair	Eyes
C	F	5'3"	145	Bl	Blu

Work Schdl. (Hours): varies

(Days Off): 1

Business/School
Clark County S

Residence Address: (Number & Street)
2313 Huntsville

Bldg./Apt.#	City	State	Zip Code
	Las Vegas	NV	89134

Res. Phone: 363-7142

Bus. Phone:

Bus. (Local) Address: (Number & Street)
varies

Bldg./Apt.# City State Zip Code

Occupation Depart Date (if visitor)

Best place to contact you during the day
Sub services

Best time to contact you during the day
5-6 PM afternoons

DETAILS

As I came up to Lake Mead (turning right from Ridgemoor) I saw the woman on the dark bike

(no strobe or lights) swerving a lot because she was trying to negotiate turning to cross the street going uphill, plus she had a bag of groceries she was carrying. She had trouble getting any speed to cross. She may not have seen the Explorer coming toward her because she had a headset on. The Explorer (driver) certainly could not see her until it was too late because the road was curving – trees blocked vision in mid – on divider – as driver came up going no faster than speed limit – I noted that because before impact I realized the Explorer would collide with bike rider before it happened. I looked in my rear view mirror & saw the Explorer impact & brake & the bicyclist slide off Explorer.

I HAVE READ THIS STATEMENT AND I AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT (LOCATION) Accident Scene

ON THE 27TH DAY OF SEPT AT 9:30 (AM/PM) 1994

Witness Officer: Illegible #1937
(SIGNATURE)

Witness Officer: Illegible #1937
(ILLEGIBLE)

/s/ Susie Olsen
SIGNATURE OF PERSON
GIVING STATEMENT

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. A339613
Dept No. XIII
DOCKET NO. "G"

DEPOSITION OF JANET KATHLEEN WAGNER
November 7, 1995

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Plaintiffs,

vs.

JANET KATHLEEN WAGNER, and DOES I through V inclusive, and ROE CORPORATIONS V through X,

Defendants.

APPEARANCES:

For the Plaintiffs:

FOLEY & JONES
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For the Defendant Wagner: EDWARDS & HALE
By Keith Edwards, Esq.
415 South Sixth, Suite 300
Las Vegas, Nevada 89101
(702) 382-1414

[p. 114] A From my cellular phone.

Q And where were you standing?

A In the street.

Q Okay. In front of your vehicle?

A I believe so, yes.

Q Between your vehicle and Erin?

A Near both the truck and her. I can't say between the two.

Q How many people appeared at the scene shortly after the collision occurred?

A I don't know exactly. I would say within the first few minutes there were maybe five or six people there.

Q Okay. And this woman that you took the phone from, can you describe her for me?

A No, I don't remember who it was that gave it to me.

Q And did you take the phone right there and dial?

A After she gave the phone to me, I called my husband at home.

Q And you called her from where – from that spot where she –

MR. EDWARDS: Counsel, you've asked this four times. Four times. I can tell you exactly where she was. You're not going to do this at trial, and you don't have a right to do it here.

MR. FOLEY: Sure he does.

* * *

[p. 123] A Within the year previous?

MR. EDWARDS: She – go ahead.

A Maybe once or twice.

Q (BY MR. RASTELLO) Okay. When did you first see your husband arrive at the scene?

A I don't know what time it was. Again, I would guess that it was probably about 15 minutes after the accident occurred.

Q And he drove his Monte Carlo from the house to the scene somewhere, but you don't know where he parked?

A Right. I know that he was parked on the street, and I believe he was parked towards the median. My guess would be that he was on the median in the westbound lane, but I just can't specifically picture it being there.

Q And the westbound lane would have been in the – pointed the same direction as your truck?

A Right.

Q Somewhere behind it?

A Right.

Q Had any police officers arrived at the time you first saw your husband?

MR. EDWARDS: She's already answered that.

A I don't remember.

Q (BY MR. RASTELLO) When you saw your husband, what did you do?

* * *

[p. 125] Q Well, what's your best memory?

A I just remember various people showing up at the accident scene. Again, I know there was an ambulance there and police were there, but I really was not cognizant of the sequence of events or the series of events or what was going on around me.

Q How long did you communicate with your husband during that first physical communication with him?

A I don't even remember if there was a verbal communication at that time.

Q But how long of a time period were you next to one another?

A He was next to me most of the rest of the night.

Q Did he have his arm around you?

A At sometimes maybe. Not the entire night.

Q Okay. At some point in time did paramedics arrive at the scene?

A I again remember seeing an ambulance there. I would assume there were paramedics there. But I couldn't say how many or positively that there was a paramedic there.

Q Did your husband notice that – the odor of alcohol on your breath?

A Not that I'm aware of.

* * *

[p. 129] officer who asked me if I was injured or needed some attention, and that was the extent of the exchange.

Q Can you describe this police officer for me?

A No, I don't recall what he looked like.

Q White, black, yellow, or older?

A I wasn't paying attention.

Q Did this police officer ask you for your driver's license?

A Not that I recall, no. Not at that first initial contact, in other words. I know at one point somebody did ask me for my driver's license. I don't know if it was him or another officer and, again, I don't believe it was at that initial contact.

Q Did any Metropolitan police officer attempt to – to separate you from the scene of the collision or to segregate you from other people at the scene?

A No. Not that I'm aware of.

Q And during your first communication with a uniformed Metropolitan police officer, the only thing you

recall them asking or him asking was whether or not you were okay?

A Yes.

Q What's the very next thing that you remember happening after that?

[p. 130] A Just like I said, you know, several people arriving. Additional police officers and highway patrol troopers. You know, I was not doing anything in particular. It wasn't any specific occurrence that I recall as happening in any sequence.

Q Well, why don't you tell me generally what happened during the next two hours while you were at the scene of the collision?

A I was just sitting near the street.

Q Where?

A You know answering – various places along the curb. I was in and out of a couple of different cars. People would coax me to sit down in a car or something. Again, I was kind of walking just back and forth down the street, you know, in a short area by where the accident occurred. Occasionally somebody would ask me a question. That's about it.

Q During the first two hours at the scene after the collision, did any Metropolitan police officer attempt to take a witness statement from you?

A Yes. There was an officer who asked me generally what had happened, and I gave a statement to him. I don't know what time that was, but I do believe it was within the first hour and a half or so.

[p. 134] Q (BY MR. RASTELLO) Do you know the reason Officer Wagner did not inform any other Metropolitan police officer that you had been drinking?

MR. EDWARDS: Object. Instruct the witness not to answer.

MR. FOLEY: You know, for the record, I think she's waived the privilege at least to a limited extent to this issue given that she has now testified about a communication she had with her husband which was not objected to when she told him that she had been drinking.

MR. EDWARDS: Appreciate your ruling on it.

MR. FOLEY: I didn't rule on it, Keith, or were you just trying to be cute?

Q (BY MR. RASTELLO) After your husband arrived at the scene, is it fair to say that you and he were physically together for the next hour and a half at the scene of the collision?

A We were – you know, at times close together and at times we weren't. Again, I was walking around and up and down and not in one stationary place, and so at times he was next to me and at times he was, you know, maybe several feet or yards away.

Q During the first two hours after the traffic collision, what did you observe the

* * *

[p. 141] A No, I don't.

Q Do you know if your husband called Sergeant Albert that night?

MR. EDWARDS: I'll object. Instruct the witness not to answer.

MR. RASTELLO: That's really – I'm not going to argue with you.

Q (BY MR. RASTELLO) Did your husband call Sergeant Albert that night?

MR. EDWARDS: Object. Instruct the witness not to answer.

MR. RASTELLO: Keith, that has nothing to do with the communication between married people.

MR. FOLEY: It really doesn't. It was something communicated by Albert to Mrs. Wagner.

MR. RASTELLO: It could have been something she observed. Don't be an obstructionist. We're just going to spend a lot of time and money for very little gain by both sides, including your client.

MR. EDWARDS: Why don't you ask her if she knows how Sergeant Albert found out about the accident.

Q (BY MR. RASTELLO) Sure. I'll ask that.

A Do I know how Sergeant Albert found out about the accident?

Q Right.

A I know now that my husband called him and [p. 142] I think it was because he used my cellular phone,

although I'm really not sure. But I have gathered that, that he called him at some point. I think he – my husband may have told me that he called him.

Q Okay. And did Sergeant Albert come to the scene?

A Yes.

Q And did you speak with him?

A At various points in the night, I did talk to him, yes.

Q What did you talk to Sergeant Albert about?

A Nothing in particular. I mean I wasn't talking much about anything. You know, like I said, I'm sure he asked me how I was or, you know, if I wanted something to eat or drink and that was the extent of it.

Q Did Sergeant Albert ask you if you had been drinking?

A No.

Q Did you tell Sergeant Albert that you had been drinking?

A No.

Q Did you see your husband speaking with Sergeant Albert outside of your presence that evening?

A He – he might have. I don't recall.

* * *

[p. 145] were driving, from what I gathered.

Q Any other car, patrol car?

A Yes. I sat in a patrol car.

Q Just one patrol car or more than one?

A Once or twice. I don't recall if it was the same car or not.

Q Okay. Do you know whose patrol car it was?

A No.

Q How is it that you ended up sitting in a patrol car? What led to sitting in that patrol car?

A It was sometime after the accident had occurred, and I asked if I could go home to use the restroom, and they drove me to the house to do that.

Q Okay. Who drove you to the house?

A I don't know who they were.

Q Was your husband with you?

A Yes.

Q And where were you sitting?

A In the back seat of the car.

Q And where was your husband sitting?

A In the back seat of the car.

Q And were there two officers in the front?

A Yes.

Q And you don't know which officers they were?

* * *

DISTRICT COURT
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DEPOSITION OF JANET KATHLEEN WAGNER
November 7, 1995

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Plaintiffs,

vs.

JANET KATHLEEN WAGNER, and DOES I through V inclusive, and ROE CORPORATIONS V through X,

Defendants.

APPEARANCES:

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* * *

[p. 114] A From my cellular phone.

Q And where were you standing?

A In the street.

Q Okay. In front of your vehicle?

A I believe so, yes.

Q Between your vehicle and Erin?

A Near both the truck and her. I can't say between the two.

Q How many people appeared at the scene shortly after the collision occurred?

A I don't know exactly. I would say within the first few minutes there were maybe five or six people there.

Q Okay. And this woman that you took the phone from, can you describe her for me?

A No, I don't remember who it was that gave it to me.

Q And did you take the phone right there and dial?

A After she gave the phone to me, I called my husband at home.

Q And you called her from where – from that spot where she –

MR. EDWARDS: Counsel, you've asked this four times. Four times. I can tell you exactly where she was. You're not going to do this at trial, and you don't have a right to do it here.

MR. FOLEY: Sure he does.

* * *

[p. 123] A Within the year previous?

MR. EDWARDS: She – go ahead.

A Maybe once or twice.

Q (BY MR. RASTELLO) Okay. When did you first see your husband arrive at the scene?

A I don't know what time it was. Again, I would guess that it was probably about 15 minutes after the accident occurred.

Q And he drove his Monte Carlo from the house to the scene somewhere, but you don't know where he parked?

A Right. I know that he was parked on the street, and I believe he was parked towards the median. My guess would be that he was on the median in the westbound lane, but I just can't specifically picture it being there.

Q And the westbound lane would have been in the – pointed the same direction as your truck?

A Right.

Q Somewhere behind it?

A Right.

Q Had any police officers arrived at the time you first saw your husband?

MR. EDWARDS: She's already answered that.

A I don't remember.

Q (BY MR. RASTELLO) When you saw your husband, what did you do?

* * *

[p. 125] happened next.

Q Well, what's your best memory?

A I just remember various people showing up at the accident scene. Again, I know there was an ambulance there and police were there, but I really was not cognizant of the sequence of events or the series of events or what was going on around me.

Q How long did you communicate with your husband during that first physical communication with him?

A I don't even remember if there was a verbal communication at that time.

Q But how long of a time period were you next to one another?

A He was next to me most of the rest of the night.

Q Did he have his arm around you?

A At sometimes maybe. Not the entire night.

Q Okay. At some point in the time did paramedics arrive at the scene?

A I again remember seeing an ambulance there. I would assume there were paramedics there. But I couldn't say how many or positively that there was a paramedic there.

Q Did your husband notice that – the odor of alcohol on your breath?

A Not that I'm aware of

* * *

[p. 129] officer who asked me if I was injured or needed some attention, and that was the extent of the exchange.

Q Can you describe this police officer for me?

A No, I don't recall what he looked like.

Q White, black, yellow, or older?

A I wasn't paying attention.

Q Did this police officer ask you for your driver's license?

A Not that I recall, no. Not at that first initial contact, in other words. I know at one point somebody did ask me for my driver's license. I don't know if it was him or another officer and, again, I don't believe it was at that initial contact.

Q Did any Metropolitan police officer attempt to – to separate you from the scene of the collision or to segregate you from other people at the scene?

A No. Not that I'm aware of.

Q And during your first communication with a uniformed Metropolitan police officer, the only thing you recall them asking or him asking was whether or not you were okay?

A Yes.

Q What's the very next thing that you remember happening after that?

[p. 130] A Just like I said, you know, several people arriving. Additional police officers and highway patrol troopers. You know, I was not doing anything in particular. It wasn't any specific occurrence that I recall as happening in any sequence.

Q Well, why don't you tell me generally what happened during the next two hours while you were at the scene of the collision?

A I was just sitting near the street.

Q Where?

A You know answering – various places along the curb. I was in and out of a couple of different cars. People would coax me to sit down in a car or something. Again, I was kind of walking just back and forth down the street, you know, in a short area by where the accident occurred. Occasionally somebody would ask me a question. That's about it.

Q During the first two hours at the scene after the collision, did any Metropolitan police officer attempt to take a witness statement from you?

A Yes. There was an officer who asked me generally what had happened, and I gave a statement to him. I don't know what time that was, but I do believe it was within the first hour and a half or so

* * *

[p. 145] were driving, from what I gathered.

Q Any other car, patrol car?

A Yes. I sat in a patrol car.

Q Just one patrol car or more than one?

A Once or twice. I don't recall if it was the same car or not.

Q Okay. Do you know whose patrol car it was?

A No.

Q How is it that you ended up sitting in a patrol car? What led to sitting in that patrol car?

A It was sometime after the accident had occurred, and I asked if I could go home to use the restroom, and they drove me to the house to do that.

Q Okay. Who drove you to the house?

A I don't know who they were.

Q Was you husband with you?

A Yes.

Q And where were you sitting?

A In the back seat of the car.

Q And where was your husband sitting?

A In the back seat of the car.

Q And were there two officers in the front?

A Yes.

Q And you don't know which officers they were?

* * *

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY, Plaintiffs, v. JANET KATHLEEN WAGNER, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, STATE OF NEVADA, EX REL., NEVADA HIGHWAY PATROL, LIEUTENANT EDWARD JENSEN, SERGENT [sic] RICHARD WOMACK, SERGEANT CURTIS ALBERT, SERGENT [sic] THOMAS HARMON, DETECTIVE RICHARD HART, DETECTIVE WILLIAM JOHNSON, OFFICER WILLIAM SMITH, OFFICER KEITH BOWERS, OFFICER DAVID WAGNER AND OFFICER GREG GOEN, SERGENT [sic] WILLIAM ADAMSON, SERGEANT HARVEY	Case No.: CV-5-97-00090-PMP(LRL) **DEFENDANT JANET KATHLEEN WAGNER'S REPLY TO PLAINTIFFS' OPPOSITION TO WAGNER'S MOTION TO DISMISS**

WEATHERFORD, TROOPER	)
JOSEPH A. SMITH, TROOPER	)
GARTH GARDNER, TROOPER	)
JOSEPH WYNGARD AND	)
TROOPER JAMES BRANNUM,	)
DOES I through XX inclusive,	)
and ROE CORPORATIONS	)
XX THROUGH XXX,	)
	)
Defendants.	)
	)

COMES NOW, Defendant, JANET KATHLEEN WAGNER, by and through her attorneys, EDWARDS, HALE, STURMAN & ATKIN, Ltd., and submits the following rebuttal in support of her Motion to Dismiss.

I.

INTRODUCTION

There are three issues are [sic] presented by the Plaintiffs Complaint in this action:

(1) can private citizens be joined in a 42 USC §1983 action for conspiracy when there was no "color of law" involved in the wrongful death?

(2) can the plaintiff state a cause of action for 42 USC §1983 after the plaintiff has already suffered her injury/death?

(3) can the plaintiffs split their causes of action and bring a state wrongful death action and file a separate action under 42 USCA § 1983?

II.

ARGUMENT

The 42 USCA § 1983 Action

Federal Court jurisdiction has been asserted in this case pursuant to 42 USC § 1983, 42 U.S.C. @[sic] 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In this case the plaintiffs have sued JANET WAGNER in state court for wrongful death.[1] Now they are attempting to bring a second action against her for violation of the plaintiffs decedent's civil rights by conspiring with the investigating officers and agencies in the investigation of the accident which caused ERIN RAE DELEW's death. Not only have the plaintiffs attempted to split their causes of action against the Defendant Janet Wagner, but they seek jurisdiction under a statute which clearly does not apply to a private citizen. Complaint ¶ 25.

> 42 U.S.C. @[sic] 1983 (1981 & Supp. 1992). By its terms, @[sic] 1983 applies only to individuals

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[1] Delew v. Wagner, case # A339613 was filed November 10, 1994 (45 days after the accident in which Erin Delew died) and is set for trial to commence in Dept. II on November 10, 1997.

acting "under color" of law. In other words, a defendant cannot be held liable under @[sic] 1983 unless his actions can be "fairly attributable to the state." Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). In Drum v. Nasuti, 648 F. Supp. 888, 897 (E.D. Pa. 1986), aff'd mem, 831 F.2d 286 (3d Cir. 1987) (quoted in Shipley v. First Fed. S & L Ass'n of Delaware, 703 F. Supp. 1122, 1127 (D. Del. 1988)), the court stated:

> the requirement of action under color of law is satisfied . . . when a private person willfully participates in joint action with a state official. . . . Thus, [to survive the defendant's motion for summary judgment,] plaintiff must demonstrate a genuine issue of material fact that there existed between the private defendant and the state official an understanding, agreement, or conspiracy to deprive the plaintiff of a federal right. He must show a genuine factual issue of a combination, agreement, or understanding among the defendants. . . . These [sic] must also be a genuine factual issue that the defendants plotted, planned, or conspired together to carry out the chain of events.

Dicola v. Fulmele, civil action No. 93-0263 (E.D. PA. 1994). (Plaintiffs must allege that the defendant's conduct was taken under color of state law *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995), reh'g denied, cert. denied, 134 L. Ed. 2d 648, 116 S. Ct. 1545, 1996.)

The plaintiffs must not only show some conspiracy between the private citizen and the state official, but they must also demonstrate "that the defendants plotted, planned, or conspired together to carry out the chain of

events." Those events must be actions fairly attributable to the state. Finally, the party asserting the constitutional right must have been living at the time that her rights were breached. *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979); *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979) ("the Civil Rights Act, 42 U.S.C. @@[sic] 1983 and 1985, does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occured after his death.").

In this case the decedent rode her bicycle into the path of the vehicle operated by JANET WAGNER. She was struck and the plaintiffs have attempted to create an [sic] question of fact concerning whether or not she was alive during the accident investigation (in an effort to assert that her constitutional rights were violated by the alleged conspiracy surrounding the investigation.[2]) The formal pronouncement of death apparently did not occur until 9:30 p.m. However, the plaintiffs face something of a dilemma (at least in one circuit); because "the Civil Rights Act, 42 U.S.C. 1983 and 1985, does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occured after his death." *Guyton v. Phillips*, 606 F.2d 248

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[2] The plaintiffs argument that Erin Delew's constitutional right to access to the courts was violated by the conspiracy between the investigating officers suggests that at some time she was going to seek redress through the courts and that the conspiracy affected her ability to unimpaired access to the courts. The fact that her death occurred before or contemporaneously with the investigation suggests that such an argument is only of academic interest and has no real application in this case.

(9th Cir. 1979) but "the victims of a cover-up are the decedent's survivors, not the decedent himself" *Gibson v. City of Chicago*, 910 F.2d 1510, 1523 (7th Cir. 1990), the plaintiffs must either acknowledge that Ms. Delew died before the alleged conspiracy or they must withdraw any personal claim of a conspiracy. The Ninth Circuit has not recognized a cause of action for the survivors of a victim to a "cover up" after a decedent's death. Hence the plaintiffs argue that ERIN DELEW was alive during the investigation. The issue can be resolved through limited discovery should it become necessary.

The cases which deal with the right to bring an action for a police conspiracy to cover up a death seem to involve cases in which the police were actually culpable for the death. See generally *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989), cert. denied, 496 U.S. 924, 110 L. Ed. 2d 638, 110 S. Ct. 2617 (1990); *Whitehurst v. Wright*, supra; *Guyton v. Phillips*, 606 F.2d 248 (9th Cir. 1979); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1264 (7th Cir. 1984).

This case calls into question several issues which are somewhat unique and which challenge the very purpose for which § 1983 was enacted. Historically § 1983 was passed to provide a remedy to individuals who were subjected to harassment and deprivation of rights by governmental officers and agencies. *Monroe v. Pape*, 365 U.S. 167 at 187, 81 S. Ct. 473 at 484, 5 L. Ed. 2d 492 (1961)[3].

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[3] Section 1979 came onto the books as @[sic] 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by @[sic] 5 of the Fourteenth Amendment to enforce the provisions of that

The unique feature of this case is that the plaintiffs are attempting to bring a § 1983 conspiracy case based on

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Amendment. n3 Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:

> "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, n4 which has since become a part of the Constitution," n5 viz., the Fourteenth Amendment. Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R. S. @[sic] 1979. See ‹=17› Douglas v. Jeannette, 319 U.S. 157, 161-162. So far petitioners are on solid grounds. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. Wolf v. Colorado,

338 U.S. 25; Elkins v. United States, 364 U.S. 206, 213.

. . .

II.

There can be no doubt at least since ‹=20› Ex parte Virginia, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See Home Tel & Tel. Co. United States v. Classic, 313 U.S. 299. We conclude that it did so intend.

an inadequate or deceptive police investigation (intentionally interfering with Plaintiff's right of meaningful access to courts). The plaintiffs do not claim that any other civil right has been violated. It is not alleged that the police were involved in causing the death of ERIN RAE DELEW. It is not alleged that any of the plaintiffs were deprived of rights guaranteed under the first, fourth, fifth, eighth or fourteenth amendments to the constitution. There is no wrongful death action against the governmental agencies – that cause of action has been split off and filed only against the DEFENDANT JANET WAGNER.

Although there is some divergence between the various circuits[4] the case of *Andrews v. Fowler,* 98 F.3d 1069 (8th Cir. 1996) seems to deal with that issue. In that action the plaintiff complained, among other things, that the sexual assault committed against her was not properly investigated. (It was alleged that the rape had been committed by a police officer). In denying relief under § 1983 the court observed:

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[4] The Fifth Circuit Court of Appeals has a number of cases (see Plaintiffs' brief) in which it attempts to define the constitutional right of "access to the courts." The right was originally recognized in criminal cases in which prisoners were to provided [sic] certain minimal equipment to assist them in gaining access to the courts. It subsequently was recognized as an infringement in a civil case when the police failed to advise a family of the facts surrounding the death of their son. See also *Foster v. City of Lake Jackson,* 28 F.3d 425 (5th Cir. 1994). Since that time there have been numerous actions to expand the "access to the courts" argument to include "meaningful access to the courts."

> While Price's failure to investigate the rape may have violated state law and common sense, it did not rise to the level of a separate constitutional violation of Andrews' rights. She made no showing that the alleged failure to investigate was on account of her gender so the claim does not implicate equal protection. See Gomez v. Whitney, 757 F.2d 1005, 1006 & n.1 (9th Cir. 1985) (stating "we can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved").

It is pointed out in *Crowder v. Sinyard,* 884 F.2d 804 (5th Cir. 1989) that § 1983 actions were primarily designed to deal with overt conduct or action by a governmental agent or agency; see also general discussion *Jenkins v. Meyers* 338 F.Supp. 383 (ND Ill. 1972) which distinguishes between a § 1983 willful acts done under color of state law and the unintentional common law tort resulting from the alleged negligence not cognizable under § 1983. The Fifth Circuit Court of Appeals has taken a broader view of cases involving "investigative coverups." However, even in that circuit the cases which recognize such a right seem to be connected with other governmental misconduct. *Love v. Bolinger,* 927 F. Supp. 1131 (SD Ind. 1996) in which victim of state-occasioned killing, and/or his survivors, asserted rights violated by a state-occasioned cover-up; *Means v. City of Chicago,* 535 F. Supp. 455 (ND Ill. 1982) conspiracy consisting of the false arrest, unjustified shooting, failure to provide medical attention and attempting to cover up the alleged events after the fact; *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983).

This case appears to present some rather unique issues regarding the potential liability of police officers and private citizens arising out of the investigation of a vehicle accident. Plaintiffs have quoted a number of cases from the Fifth Circuit Court of Appeals to suggest that an estate may bring an action under § 1983 on behalf of the deceased. However, the plaintiff has done nothing to distinguish the Ninth Circuit Court of Appeals cases which hold that there is no constitutional right "to have a full and fair police investigation into violence done against themselves or their children." *Gomez v. Whitney,* 757 F.2d 1005 (9th Cir. 1984); see also *Estate of Cartwright v. City of Concord,* 618 F.2d Supp. 722 (ND CA 1985), aff'd 856 F.2d 1437 (9th Cir. 1988).

Janet Wagner's Rights Were Compromised By The Investigation

The suggestion that JANET WAGNER was a co-conspirator of the police investigation is ludicrous. No one can point to any "conversation or action" between Mrs. Wagner and the investigating officers that reflected an agreement between the officers and her. In fact, had there been such an agreement Mrs. Wagner certainly would never have been subjected to either a field sobriety test or a blood test.

The plaintiffs' desire to implicate Mrs. Wagner in the police investigation ignores the undisputed facts in this case. JANET WAGNER had the right to a properly conducted investigation which included freedom from improper chemical testing without probable cause. Mrs. Wagner was not properly subjected to any inquiry until

some "probable cause" existed to suggest that she had been using alcohol. After "probable cause" existed she could then be given a field sobriety test (HGN). Until she had been administered and failed a field sobriety test she should not have been subjected to any chemical testing. Each of the officers at the scene of the accident was asked what contact they had with JANET WAGNER and if they smelled her breath. Officer Adamson indicated that he was advised upon his arrival at the accident scene that an officer had smelled alcohol on Mrs. Wagner's breath. Adamson deposition pp. 73-74, Officer Alpert testified:

> Dave Wagner didn't know anything about her drinking. I had been sitting next to her for two and a half to three hours and never smelled any alcohol on her, and I was sitting shoulder to shoulder with her.
>
> Q. Did you attempt to smell any alcohol on her?
>
> A. To be honest with you, it never – the thought never entered my mind, but when you're sitting that close to somebody if they've been drinking – and I'm a non-drinker – you can normally smell it. And I was as surprised as Dave was. Depo pp. 55-56
>
> Q. Did you subsequently come to learn that she had been drinking?
>
> A. Yes.
>
> Q. How did you learn that?
>
> A. When she was going down for the blood alcohol test and Dave – well, the NHP officer was standing right there, and Dave had asked, did she pass her field sobriety? And he had said,

> yes, she did – or did she fail it? Either way she passed her test – I don't remember the exact words he used – and that they had requested a blood alcohol test from her. And Dave had asked why. And the trooper had said, she had had a beer. And that's when I learned of it. Alpert Deposition p. 67.

Officer Joseph Smith testified that Officer Wyngard thought he smelled alcohol on Mrs. Wagner's breath. Officer Smith then performed a field sobriety test (horizontal gaze nystagmus or HGN) on Mrs. Wagner.

> Q. Okay. Going back to Mrs. Wagner and the HGN test, did you perform an HGN test upon her?
>
> A. Yes, I did.
>
> Q. And what did you observe?
>
> A. Nothing.
>
> Q. You made no observations?
>
> A. Well, her – I mean as far as the six clues or points that you look for, there weren't any. Besides the eyes being bloodshot and watery from crying, I didn't see any nystagmus whatsoever or smell any order of alcohol coming from her. J. Smith Deposition pp. 115-116.

Officer Wyngard testified, "I smelled this light order unknown alcoholic beverage on her, about her person. (Wyngard deposition p. 50). He also testified that he is "pretty good" at detecting the order of alcohol; that he can smell it when no one else can. Id. at 51. Officer P. Smith was the first Metro officer to arrive at the scene and he testified that he was within 18 to 24 inches of Mrs. Wagner when he interviewed her for her account of the

accident and that he did not detect any odor of alcohol. P. Smith Deposition p. 85. The other officers were not involved with Mrs. Wagner and never had occasion to speak with her or get close enough to smell her breath.

Until Officer Wyngard smelled a "light odor of alcohol about her person" there was no "probable cause" for a field sobriety test. Once Mrs. Wagner passed the field sobriety test there was nothing to justify a blood test. Even at that, if a blood test was going to be performed it had to be done pursuant to the statute which requires:

> 484.379. Driving under the influence of intoxicating liquor or controlled substance: Unlawful acts; affirmative defense
>
> 1. It is unlawful for any person who:
>
> (a) Is under the influence of intoxicating liquor;
>
> (b) Has 0.10 percent or more by weight of alcohol in his blood; or
>
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have 0.10 percent or more by weight of alcohol in his blood, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.
>
> 2. It is unlawful for any person who is an habitual user of or under the influence of any controlled substance, or is under the combined influence of intoxicating liquor and a controlled substance, or any person who inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders

> him incapable of safely driving or exercising actual physical control of a vehicle to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.
>
> 3. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood was tested, to cause the alcohol in his blood to equal or exceed 0.10 percent. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

Despite the fact that Mrs. Wagner's use of alcohol was within 15 minutes of the accident and despite the fact that there was no probable cause to subject Mrs. Wagner to a blood alcohol test and despite the fact that the test was taken more than two hours after the accident, and despite the fact that the results of the test showed a blood alcohol level of 0.05% after the most recent intake had finally entered the blood stream[5]. Mrs. Wagner's rights were of

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[5] At the time of the accident the alcohol which has been drunk with [sic] 15 minutes was not in the blood stream, but after three hours, despite the trauma of having hit a "darting bicyclist" the most recently ingested alcohol had finally entered the blood stream.

secondary consideration to the investigating officers. Although the investigating officers made mistakes during the investigation those mistakes were to the detriment of Mrs. Wagner and cannot form the basis for a conspiracy.

Splitting Actions

The plaintiffs seem to ignore this defendant's objection to having to defend two lawsuits. As was pointed out (without opposition) in the original Motion to Dismiss the criteria for determining if the plaintiffs have attempted to split their causes of action are:

> 1) whether separate actions brought arise out of the same act, contract or transaction; 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions. The word "transaction" has a broad meaning. It has been defined as the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose. [Citations omitted].
>
> The cases dealing with res judicata and the splitting of a single cause of action apply the same standard as the compulsory counterclaim rule.

King Gen Contrs., Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 1991 Mo. App. LEXIS 444, (Court of Appeals of Missouri, Western District, 1991). The action against JANET WAGNER should have been asserted at the time of the initial complaint. The attempt to now bring a new separate cause of action is ill founded and contrary to cited precedent.

III.

CONCLUSION

The plaintiffs have attempted to make a claim against a private citizen under 42 USCA § 1983, but in so doing have ignored the law in this circuit. Additionally, the attempt to make Mrs. Wagner defend two separate lawsuits arising out of the same facts and circumstances is improper. For the foregoing reasons it is respectfully requested that this court grant DEFENDANT JANET WAGNER's Motion to Dismiss.

DATED this 17th day of March, 1997.

Respectfully Submitted,

By /s/ Keith Edwards
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17th day of March, 1997, I served DEFENDANT, JANET KATHLEEN WAGNER'S REPLY TO PLAINTIFFS' OPPOSITION TO WAGNER'S MOTION TO DISMISS by depositing a true copy thereof in the U.S. Mails, postpaid and addressed as follows:

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